No. 14795

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,
Appellant,

vs.

ERNEST EVERETT,
Appellee.

Appeal from the District Court of the United States for the Eastern District of Washington Northern Division

HON. SAM M. DRIVER, *Judge*

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

JURISDICTION

The Appellee accepts the jurisdictional statement of the Appellant.

RESTATEMENT OF THE CASE

The Appellant's Statement of the Case is controverted in part as incomplete. A full exposition of all of the facts presented to the jury is necessary for an understanding of the situation at hand as it truly came to pass.

As Appellant has stated, this is a crossing case involving a collision between plaintiff's panel truck being driven by his sixteen (almost seventeen) year old daughter, and defendant's passenger train. The accident happened about three o'clock in the afternoon on a clear, dry day, at a place approximately 4.75 miles east of Ellensburg, Washington. Defendant's Exhibit 1 adequately depicts the physical layout of defendant's trackage and O'Neill Road as it approached and crossed over the track.

A synthesis from testimony and physical evidence designed to reconstruct the factual situation so that appropriate rules of law may be applied thereto is always somewhat difficult, and it has been made particularly so here, since we are dealing with a constantly altering speed time and distance relationship between the moving train and the panel truck. However, there were only five surviving witnesses, including defendant's Exhibit No. 36—the speed tape—to the actual collision, and the testimony of those witnesses will be considered individually, commencing arbitrarily with Mr. Scobee.

Mr. Scobee said that he was operating his train in a westerly direction at a speed of sixty miles per hour as he approached the railroad whistle post, one thousand three hundred and twenty-three feet east of O'Neill crossing; (Tr. 250) that he gave two long blasts of the whistle and immediately the panel truck appeared, emerging from a kind of blind area behind the Milwaukee viaduct piers about twenty-five feet south of the crossing, going north. (Tr. 256) It was Mr. Scobee's recollection that at that moment he was two or three hundred feet east of the Milwaukee overpass, or nine hundred to a thousand feet east of O'Neill crossing. (Tr. 252-6) The speed of the truck was elsewhere estimated at ten miles per hour. (Tr. 416) Mr. Scobee said that upon observing the truck he made a service, as distinguished from an emergency, application of his brakes. (Tr. 256, 404) He felt the braking action of the train take hold and then the truck momentarily stopped or slowed down clear of the crossing. (Tr. 257, 404) He released the brakes and immediately the truck bucked up on the tracks and stalled there. Scobee testified that at this moment he was crossing under the Milwaukee viaduct and was approximately six hundred feet east of the crossing. He applied full emergency braking to the train, crashed into the stalled truck and continued down the track some sixteen hundred feet west of the crossing. The last thing he remembered seeing, just prior to the impact, was the left front door of the truck being opened and the Everett girl's head emerging.

The testimony of the fireman, Mr. Harvey Glen Williams, was substantially similar to that given by Mr. Scobee. He said the engineer gave two long blasts of the whistle when the tran was at or very near the whistling post. (Tr. 417) He saw the truck for the first time when the train was at a place approximately one hundred feet east of the viaduct, and at that time the truck was fifteen or twenty feet south of the crossing, moving at a speed of about ten miles per hour. (Tr. 416) He stated that as the truck approached the crossing "it slowed down, very slow, or may have come to a stop, I don't know," and he then observed the truck jump or jerk ahead up onto the track and stall there. (Tr. 418) From his position in the cab he could see the girl apparently having some kind of trouble with the gear shift lever. He saw some black smoke coming out from the truck's exhaust pipe and he then saw the girl get out of the truck, start to shut the door and take three or four steps running away from the train toward the west.

The testimony of John J. and Lawrence O'Neill contradicted that of the engineer and fireman as to the place where the first whistle sound was loosed. (Tr. 293-303) Both O'Neills testified unequivocally that the train gave no warning whistle of any kind prior to the time the train was emerging from the underpass, or, in other words, their testimony established the fact that the train did not sound its whistle one thousand three hundred and twenty-three feet east of the crossing, and continue to sound it until

the train intersected the crossing, as it is required to do by statute in the State of Washington, (R.C.W. 81.48.010, Tr. 523, 524); that on the contrary, the train failed and neglected to sound the whistle until it was something appreciably less than six hundred eighty feet east of the crossing.

John O'Neill further stated that there was no noticeable slackening of the speed of the train from the time he first saw it until after it reached the crossing. (Tr. 295) Lawrence O'Neill testified that he noticed no slowing of the train during any of the time his attention was directed towards it. This witness also said that defendant's Exhibit No. 30—a panoramic photo—was a fair representation of the condition of the south approach to the crossing with reference to the absence of ballast, or dirt, between the roadbed and the planking adjacent to the track. (Tr. 313) He enlarged upon this on being questioned by saying that when he drives over this crossing from south to north he always goes to the left-hand side of the road in an effort to avoid the big hump caused by the exposed planking. (Tr. 318)

Along this same line it may be recalled that Mr. Everett testified that a few days after the accident he took a measurement of this defect and found that there was a jump-up of about five inches from the bed of the county road to the top of the planking next to the south side of the track. (Tr. 96) Accord-

ing to Mr. Everett, one had to shift down and apply additional acceleration to the car else there was "a very good chance of stalling your car." (Tr. 103, 4)

Joseph F. Gaynor testified for the defendant as an expert witness. He was a graduate electrical engineer and had been superintendent of electrical operations for the Great Northern Railroad Company for the past fourteen years. He identified defendant's Exhibit 36—the speed tape—described its operation and function, and decoded its markings into a pictorial language understandable to all. In Appellee's judgment, the information on the speed tape was absolutely correct and irrefutable. It is unchallengable, and stands unchallenged as an on-the-spot, exact mechanical record of the precise manner in which defendant's train was operated from the city of Ellensburg to the place where the train stopped after the collision at O'Neill's crossing. It accurately recorded the speed at which the train traveled, the various distances covered at various speeds, and the various points where braking power was applied to the train and deceleration occurred. Great weight should have been, and undoubtedly was, given this evidence by the jury. As Mr. Gaynor aptly said, "the speed tape will protect an engineer or hang him if he is exceeding or going outside of the rules." (Tr. 439) In passing, it does not strike Appellee as inappropriate to point out that in spite of the obvious importance and meaningfulness of the evidence made

plain by this mute witness, one can read the Appellant's Brief from beginning to end, and back again, without finding so much as a single reference even to the existence of a speed tape. The blunt reason for its pointed absence is the fact that the speed tape flatly contradicts the testimony of the engineer and the fireman concerning the circumstances of the collision, and what they did and when they did it. From the tape Gaynor was able to determine that the train started at Ellensburg, or Milepost Zero, and at one mile out, was going forty-five miles per hour. Two miles out it was moving at fifty-five miles per hour, and at two and one-half miles out the train had slowed to around thirty-seven to thirty-eight miles per hour and held that speed for about one-fourth of a mile. (Tr. 471) From that point on the speed increased at a fairly even rate to sixty miles per hour. When sixty miles per hour was reached, the acceleration was arrested by a service application of the brakes, and the speed of sixty miles per hour was maintained for one-half mile. At that time, which was one-half mile, or two thousand six hundred forty feet, west of the O'Neill crossing, the service application was released, the train accelerated to sixty-four miles per hour and maintained that speed undiminished by any type of braking—service, emergency or otherwise—to the point of impact with the truck, immediately after which the speed started dropping off to zero miles per hour, and stopped at a distance of about one-fourth of a mile from the crossing.

On these facts the court submitted to the jury three allegations of negligence on the part of defendant which proximately caused the death of the minor and plaintiff's resultant damage. These allegations were:

1. That the defendant neglected and failed to sound the crossing signals required by the statutes of the State of Washington as the locomotive approached the said crossing, by either blowing a whistle or sounding a bell on the locomotive;

2. The defendant negligently failed to stop the train, slacken its speed or give timely or adequate warning of its approach to the crossing, when the persons operating the train saw, or by the exercise of ordinary care should have seen, Erna Mae Everett, and plaintiff's panel truck in a position of imminent peril of being struck by the train;

3. That the defendant negligently failed to maintain at a proper and safe level the rock and cinder ballast on the roadway leading up to the crossing and immediately next to the wooden planking at the crossing.

ARGUMENT

Answer to Specifications of Error Nos. I, II and III

Appellant urges by the above numbered Specifications that the District Court erred in denying Appellant's motion for a directed verdict at the close of Appellant's case, at the close of all of the evidence, and further erred in denying Appellant's motion for a judgment notwithstanding the verdict, or in the alternative for a new trial. These Specifications are predicated on Appellant's contentions that there was no actionable negligence on Appellee's part; that Erna Mae Everett was guilty of contributory negligence as a matter of law, and that the doctrine of last clear chance is not applicable to the facts at hand. It is a beguiling procedure to compare the factual situations found in a variety of cited cases to the facts of a case at hand, and argue that since the fact situations are similar the results obtained must be identical. The truth is, though, that each case has dissimilar facts of its own against which must be applied preconceived concepts of law for a proper result to obtain. In this connection the case of *Scott v. Pacific Power & Light Company,* 178 Wash. 647; 35 P. 2d 749, gives a clear expression of the rule of law with which we are dealing herein:

> "Upon an issue as to contributory negligence, where there is evidence and inferences to be deduced therefrom by which reasonable men may

arrive at different conclusions, contributory negligence is a question for the jury. In passing upon that question, we must accept as true that view of the evidence most favorable to the respondent. *Bryant v. Hartford Eastern Ry. Co.,* 158 Wash. 389, 290 Pac. 874.

> " 'In but two classes of cases may the question of negligence be determined by the court as a conclusion of law: (1) Where the circumstances of the case are such that the standard of duty is fixed, and the measure of duty defined, by law, and is the same under all circumstances; (2) where the facts are undisputed and but one reasonable inference can be drawn from them. (Citing cases)
>
> " 'And where the minds of reasonable men may differ, the legal sufficiency is for the jury.' (Citing case)

"In determining the question of contributory negligence, due care or ordinary prudence under the circumstances is the only test. (Citing cases) The existence of contributory negligence must be judged by respondent's condition and surroundings at the time of the accident, and whether, under the circumstances, he acted as a reasonably prudent man would have done.

> " 'After an accident happens it is always easy to see many ways by which it could have been avoided, but such considerations do not usually afford a correct test of negligence. A victim of an accident is entitled to have his conduct judged by the circumstances surrounding him at the time of the accident—by the conditions as they appeared to one in his then situation—and if his conduct when so

> judged appears to be that of a reasonably prudent person, he cannot be said to be guilty of negligence.' *Hull v. Seattle, Renton & Southern R. Co.,* 60 Wash. 162, 110 Pac. 804.

> "Ordinarily, the question of contributory negligence is for the jury. A court will determine the question only when but one reasonable conclusion can be reached from a given state of facts."

Appellant attempts to come within the confines of the above rule by contending that Appellee, and presumably the jury likewise, was in some manner bound by the testimony of the engineer and fireman. Scobee was dismissed as a party defendant without objection on Appellant's part, and the testimony of those who contradicted and testimonially impeached him, was heard by the jury without objection being made. Appellant cites no authority to support this strange theory, and Appellee has found no case which discusses pro or con Appellant's proposal. The reason may well be that to date no such idea concerning the law of evidence has been put forward for serious consideration by an Appellate Court. What has been said time and again in cases was said in *Cunningham v. Thompson,* 277 S.W. 2d 602, (Mo.) p. 610:

> "In this case defendant's employees testified they did not see plaintiff approach the crossing. Of course, the jury was not obliged to believe the employees' testimony. . . ."

In the case at hand the jury was in no way obligated to believe all that to which Scobee testified. They could well have believed that he did see the approach of the truck and did make a service application of the brakes, as he so testified. They could likewise have believed that he was mistaken in his estimate of his position when he saw the girl and made the application. They could have rejected his testimony that he was at that moment nine hundred to one thousand feet away from the crossing and accepted the testimony of the speed tape which placed him at that moment, a mile away from the crossing. The jury may have believed Scobee when he said he watched the truck and when it paused or stopped at the crossing he released the service application of the brake, and, by the same token believed the speed tape when it placed the train two thousand six hundred forty feet away from the crossing at the instant the service application of braking was released. If such were the facts accepted by the jury, it would make no real difference whether the girl saw the train, couldn't see the train or was oblivious to the train (possibilities which the death of the girl bars us now from ever knowing), since in any event she would have had ample time to get across the track had she not stalled thereon. It seems apparent that reasonable minds could find a total lack of contributory negligence in the act of attempting to drive a panel truck across a railroad track with a train approaching one-half mile away.

As to the place where the train's warning whistle was blown, the jury was as free to believe the two O'Neills when they said it was first heard five or six hundred feet west of the crossing, as they were free to disbelieve the engineer and the fireman when they said it was first blown one thousand three hundred twenty-three feet west of the crossing. And had the whistle been blown at the whistle post instead of someplace between the viaduct and the crossing, it may reasonably be inferred that the girl would have had time to safely flee her vehicle.

With reference to Appellee's claim that the defendant negligently failed to maintain at a proper and safe level the rock and cinder ballast on the roadway leading to the crossing and immediately next to the wooden planking of the crossing, Appellant, in his Brief at page 47 states, that there is an utter absence of evidence that this condition caused the truck to stall. Appellee submits that Appellant errs. Defendant's Exhibit No. 30, along with several of the other photographs, show the condition of the south approach to the crossing and show the absence of dirt between the roadbed and the planking. Mr. Everett testified that he measured this defect and found that there was a five-inch jump-up from the roadbed to the top of the planking, and further testified that in maneuvering this stretch of road one had to shift down and "goose" the engine, else there was a very good chance of stalling the car. In addition, the engineer and fire-

man stated that the car appeared to "buck up" onto the crossing and stop, and that a cloud of black smoke came out of the exhaust pipe. In this mechanized day and age every man, woman and adolescent child knows that if the forward motion of slowly moving rear wheels of an automobile is suddenly stopped and the clutch not disengaged the engine of the vehicle necessarily must, and will, stall.

A case in point is *Moore v. Atlantic Coast Line Railroad Co.,* 201 North Carolina 26, 158 S.E. 556. This was also a crossing case involving defendant's train and a bakery wagon which stalled on the railroad track. There was evidence that the rails projected two or three inches above the planking on the crossing. The question arose as to the defendant's negligence in the maintenance of the crossing. In discussing this question, the court stated in part:

> "It is hardly open to doubt that, if the engine had not stopped running, the truck would have passed the crossing in safety. Why the engine stopped is left in doubt. We see no convincing evidence that it was due to the driver's negligence. It may more reasonably be attributed to the condition of the crossing."

The case that Appellant cites on page 48 of his Brief in support of his views on this subject, to-wit: *Stephen v. Elgin, Joliet & Eastern Railway Co.,* App. Crt. of Ill. 120 N.E. 2d 52, does not appear to be in point. In that case it was apparently found as a fact

that the plaintiff, after his car had stalled, saw the train approaching when it was nine hundred feet away. In the case at hand there is no evidence whatsoever that the deceased girl at any time saw the approaching train when it was a sufficient distance away to permit her escape.

> See also *Cashatt v. Brown,* 211 North Carolina 367, 190 S. E. 480.

Appellant objects strenuously to the submission of the doctrine of last clear chance to the jury by the trial court, asserting that the record is devoid of any testimony of a substantial character or probative value that would bring the case at bar under either branch of the doctrine. At the outset Appellee agrees with Appellant, that whether or not any situation calling for the application of the doctrine of last clear chance is applicable in a given case, is a question of law to be determined by the court. See: *Delsman v. Bertotti,* 200 Wash. 380, 93 P. 2d 371. As to the doctrine itself, it is basically a double-phased, logical refinement or further probing of the concept of proximate cause as it relates to negligence and contributory negligence. As Appellant has indicated in his Brief, the case of *Leftridge v. Seattle,* 130 Wash. 541, 228 P. 302, contains the accepted form of the rule and has defined phase one thusly:

> "(1) That where the defendant actually saw the peril of the traveler on the highway and

should have appreciated the danger, and failed to exercise reasonable care to avoid injury, such failure made the defendant liable, although the plaintiff's negligence may have continued up to the instant of the injury."

Phase two is defined in the *Leftridge* case as follows:

"(2) That where the defendant did not actually see the peril of the plaintiff, but by keeping a reasonably careful lookout commensurate with the dangerous character of the agency and the locality, should have seen the peril and appreciated it in time by the exercise of reasonable care to have avoided the injury, and failure to escape the injury results from failure to keep that lookout and exercise that care, the defendant was liable only when the plaintiff's negligence had terminated or culminated in a situation of peril from which the plaintiff could not, by the exercise of reasonable care, extricate himself."

Much of what has been previously said herein goes to support Appellee's contention that both phase one and phase two of the doctrine were properly submitted to the jury by the court. If the jury, in the exercise of its function, found that the deceased girl was guilty of antecedent negligence by driving the panel truck on the railroad track with knowledge that a train was approaching approximately one-half mile distant, and if the jury further found, as has been shown it reasonably could, that the engineer saw the girl drive on and stall on the tracks immediately after releasing his service application of braking when he

was, according to the speed tape, one-half mile away, and the engineer did not apply any braking till within four hundred feet of the crossing, and did not blow a warning whistle until within five to six hundred feet of the crossing, the Appellant would plainly be liable under the doctrine of last clear chance, whether plaintiff's negligence may have continued up to the instant of the injury, or not. If, on the other hand, the jury found, as has been shown it could have found, that the deceased attempted to cross the tracks without looking toward the west for an approaching train, and her negligence consisted of so doing, that antecedent negligence would have terminated or culminated in a situation of peril when her truck became stalled on the tracks. If, under those facts, the jury rejected Scobee's testimony that he actually saw the truck from the time it approached the crossing until it was struck, but believed on the contrary that he did not actually see the peril of the plaintiff's minor daughter, but by keeping a reasonable, careful lookout commensurate with the dangerous character of the agency and locality should have seen the peril, and by the exercise of reasonable care could have stopped his train prior to the collision or given the statutory warning whistle one thousand three hundred twenty-three feet from the crossing, and by so doing have avoided the injury, Appellant was liable under phase two of the doctrine. Consequently, Appellee respectfully submits that the trial court properly analyzed the potentials of the disputed factual situation at

hand and correctly submitted both phase one and phase two of the doctrine of last clear chance.

Answer to Specifications of Error Nos. IV, XII and XIII

Appellant claims by these Specifications that the district Court erred in refusing to give Appellant's requested instruction No. 8 to the effect that if the jury found that the deceased at the time in question did not have a vehicle operator's license and that the plaintiff, her father, knew that she didn't have one, but permitted the girl to operate the vehicle, then the plaintiff violated a specific Washington statute and was guilty of negligence *per se.* Error is further claimed in not allowing defendant to prove under cross-examination that the deceased did not have an operator's license and in sustaining plaintiff's objection to defendant's offer to prove that the girl did not have an operator's license. The answer to these specifications is found in the *Revised Code of Washington* 46.20.030, which states in part as follows:

> "The director shall not issue a vehicle operator's license to the following: (1) Any person under the age of sixteen years;"

and in the case cited by Appellant in his Brief at page 60, *Atkins v. Churchill,* 30 Wash. 859, 194 P. 2d 364. In that case the defendant entrusted his vehicle to his daughter and five other young people so that they could attend some social function. Quoting from page 864 of the decision:

> "None of these six persons was more than fifteen years of age, and none had an automobile operator's license or was qualified under the statute which provides that a vehicle operator's license shall not issue to any person under the age of sixteen years."

At page 865 of the opinion, this is found:

> "The authorities uniformly hold that it is negligence per se for the owner of a motor vehicle to entrust it to a minor under the age specified by statute. The prohibitory enactment itself constitutes a conclusive declaration that an individual younger than the age designated is incompetent to drive a motor vehicle.
>
> "The negligence of appellant was submitted to the jury on two theories: (1) Entrusting the automobile to an unlicensed minor under the age where one is eligible to secure such license."

Plainly the writer of this decision was concerning himself with *Section 46.20.030 R.C.W.*, supra and not *46.20.230 R.C.W.* cited on page 60 of Appellant's Brief. The District Judge analyzed this contention at time of trial when it was first raised, probably as clearly as possible (Tr. p. 164):

> "Now, the part that Mr. McKevitt read, the general rule is stated that:
>
> > 'The owner of a motor vehicle who entrusts the vehicle in the hands of an unfit person, thereby enabling the latter to drive it, may be held liable for an injury negligently in-

> flicted by the use of the vehicle by its driver as a proximate result of incompetency or unfitness of the driver, although the use being made of the vehicle at the time of injury was beyond the scope of the owner's consent. The authorities uniformly hold that it is negligence per se for the owner of a motor vehicle to entrust it to a minor under the age specified by statute.'

"Now, I take that to be under the age specified by statute, under the age of 16, and not under the age of 18 years. The 18 years simply provides that no parent shall permit a minor under 18 to drive a car unless they have a license. I think that is apparent from the next sentence:

> 'The prohibitory enactment itself constitutes a conclusive declaration that the individual younger than the age designated is incompetent to drive a motor vehicle.'

"Now, how could the law conclusively declare a person under 18 is incompetent to drive a motor vehicle if their parent chooses to turn around and give them a license to drive one? There is no conclusive declaration that a person 17 years of age, certainly, is incapable of driving a motor vehicle. If that were the policy of the law, there wouldn't be any license issued to them. So that I think this applies only to those cases where the minor is of the age where they are not eligible under any circumstances to procure a driver's license, and I think under the rule relied upon here, that is immaterial whether or not this girl had a license."

Answer to Specification of Error No. V

Appellant contends here that the District Court erred in refusing to give a portion of Appellant's requested instruction No. 3. Appellant did not include this Specification in his Statement of Points on Which Appellant Relies. Such a failure is violative of Rule 19, subparagraph 6 of the above court, (miscalled Rule 17, subparagraph 6 by Appellant). Consequently, Specification of Error No. V should not be considered by this court. Quoting from Rule 19, subparagraph 6:

> ". . . If parts of the record shall be so designated by one or both of the parties, or if such parts be distinctly designated by stipulation of counsel for the respective parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record and the points so stated."

In this connection see also:

> *Bank of America National Trust & Savings Assn. v. Commissioner of Internal Revenue,* 126 F. 2d p. 48 (Ninth Circuit);
>
> *Western National Insurance Co. v. LeClare,* 163 F. 2d 337 (Ninth Circuit);
>
> *United States v. Gallagher,* 151 F. 2d 556 (Ninth Circuit).

In any event, the Specification cannot be well taken because the District Court did, in fact, give the requested instruction at page 527 of the Transcript:

> "Now, if you find from the evidence that the train and automobile were simultaneously approaching the crossing in question, then the operators of the locomotive and (618) train, had a right to assume, until the contrary became evident, that Erna Mae Everett would give the train the right-of-way, and the engineer was not required to attempt to slow or bring to a stop his train because the automobile may have been approaching the track."

Answer to Specification of Error No. VI

Appellant contends herein that the District Court erred in refusing to give defendant's requested instruction No. 7 to the effect that if the jury found from the evidence that the deceased died as the result of attempting to beat defendant's train across said track then the verdict should be for the defendant. Here again the Specification of Error was not included in Appellant's Statement of Points on Which Appellant Relies and is, as was Specification of Error No. V, in violation of this Court's Rule 19, subparagraph 6, and likewise should not be considered by the court. However, the Specification otherwise has no merit because there was certainly no evidence or inference that the deceased was attempting to beat the train across the crossing. Appellant's flat statement that there is substantial evidence in the record to jus-

tify this proposition is a figment of its imagination. The only testimony on this subject was that of the engineer and the fireman who testified that the girl approached the track at a slow speed, approximately ten miles per hour, slowed or stopped just south of the crossing and then "bucked up" onto the track and stalled there. It is ridiculous to assert that such testimony could give rise to any inference that the deceased girl was attempting to race the train in an effort to beat it across the crossing. In any event, Appellee respectfully submits that the requested instruction was substantially covered by the District Court by the following instruction found at page 526 of the Transcript:

> "Now, under the laws of this state, the railway company has the right-of-way over a motorist at a crossing such as here involved, that is to say, a crossing at grade, and the driver of a motor vehicle is legally required to accord such right-of-way to an approaching train when both automobile and train are approaching the crossing simultaneously."

Answer to Specification of Error No. VII

Herein the Appellant claims error in the giving of the instruction set out on pages 36, 37 of Appellant's Brief, (Tr. 20) to the effect that it is the law of the state of Washington that an engineer who fails to ring the bell or sound the whistle on a locomotive at least eighty rods from any place where the railway

crosses a road or fails to continue ringing the bell or sounding the whistle until the locomotive has crossed the road, shall be guilty of a misdemeanor. The jury was charged that if they found that the engineer, F. W. Scobee, had failed to ring the bell or sound the whistle as required by the statute, such failure would constitute negligence, and "if such negligence proximately caused the death of Erna Mae Everett, it would entitle the plaintiff to a verdict in his favor in the absence of contributory negligence on the part of Erna Mae Everett." This was an absolutely correct statement of law to which the case of *Sadler v. Northern Pacific Railway Company,* 118 Wash. 121, 203 P. 10, does no violence whatsoever. The opinion in the *Sadler* case does not set out the instructions given to the jury, but it is indicated that the jury was instructed with reference to the negligence in failing to give warning to those about to use such crossing. The court specifically stated on page 130 of that opinion: "These instructions stated the law correctly." The whole point in the *Sadler* case was that the court found that upon the particular set of facts presented therein the contributory negligence of the deceased plaintiff was so conclusively established as to leave no question for the jury. That contingency was plainly covered in the disputed instruction by the charge that such negligence must exist in the absence of contributory negligence on the part of Erna Mae Everett and, further, such negligence must be the proximate cause of the death of the girl.

Answer to Specification of Error No. VIII

Here Appellant claims error in the District Court's instruction to the jury with reference to the doctrine of last clear chance. This Specification has been answered in Appellee's Answer to Specifications of Error Nos. I, II and III.

Answer to Specifications of Error Nos. IX and X

These Specifications have likewise been dealt with and answered in Appellee's Answer to Specifications of Error Nos. I, II and III.

Answer to Specification of Error No. XI

Appellant claims that the District Court erred in submitting to the jury Appellee's allegation of negligence predicated upon the defendant's failure to sound the crossing signals required by the statutes of the state of Washington as the locomotive approached said crossing, by either blowing a whistle or sounding a bell of said locomotive. The answer to this specification has been thoroughly made in Appellee's Answer to Specifications of Error Nos. I, II, III and VII herein, and we will not therefore further prolong this Brief by additional answer.

Answer to Specification of Error No. XIV

Here Appellant claims error in the denial of Appellant's motion for a new trial upon the ground that the verdict was excessive. To give some brief factual

background, Erna Mae Everett was sixteen years and eleven months old at the time she was killed. She attended high school and lived at home with her family on a 76-acre farm. This was an ordinary, hard-working family, in no sense of the word well off, but able to take care of itself. She was an attractive, physically healthy girl, and was in the process of making her spring wardrobe in her domestic science class at high school, where she consistently received good marks. She enjoyed helping her father with the farm work and actually did a considerable portion of that work. She helped her mother when called upon to do so and was generally a good, healthy, willing girl, and a plain asset to any family unit. The District Court properly instructed the jury as to the measure of damages in cases such as this. (Tr. p. 530) There are a number of Washington cases which ably discuss this question of damages, with the case of *Skeels v. Davidson,* 18 Wash. 2d 358, 139 P. 2d 301 giving probably the best analysis of the whole situation. That case involved the death of a six and one-half year old boy whose father was awarded damages in the sum of $1,125.00. Therein the court stated in part, commencing at page 367, as follows:

> "There is, perhaps, no other phase of the law of damages which is in so unsatisfactory a state as that concerned with the rule governing damages for the wrongful death of a child, under a statute such as our own which creates the right of action, but prescribes no measure of recovery. . . .

> " 'The object of the statute is to create a new and independent right of action for the loss of services subsequent to the decease of the child, which did not exist at comman law.'

"Accordingly, the court quite naturally arrived at the following conclusion:

> " 'The measure of damages in such cases is the value of the child's services from the time of the injury until he would have attained the age of majority, taken in connection with his prospects in life, less the cost of his support and maintenance.'

"This court and the majority of state courts—for this interpretation has been quite general—have attempted to apply this rule ever since. This court, like others, has long realized that the rule is not satisfactory, and in many cases wholly impractical. . . .

"It is a matter of common knowledge that, previous to the present war at least, such a computation as the jury was directed to make would result in no damages, except in the cases of a few gifted children employed in the entertainment field. . . .

"In speaking of the decisions of other states, the author of the opinion said:

> " '. . . in principle they hold that it is the purpose and intent of the statutes to provide for the award to the parents of substantial damages in all cases where the death of their child is caused by the negligence of another.'

"This broad generalization was not new in our case law. Substantially, the same statement was made in the opinion in *Atrops v. Costello, supra,* decided in 1894. It is clearly made one of the grounds of decision in the opinion in *Sweeten v. Pacific Power & Light Co.*, 88 Wash. 679, 153 Pac. 1054. In sustaining an award of $2,593, with respect to the death of an eight year old boy, Judge Ellis, speaking for the court said:

> " 'The claim that there was a fatal lack of proof, in that there was no evidence as to the probable value of the services of the child had he lived to his majority, is without merit. In such a case it is within the province of the jury, knowing the age, health and capacity of the child and the situation of the parent, to form an estimate of the pecuniary loss to the parent, present or prospective, resulting from the death of the child, and thereon award substantial damages. . . . In the nature of the case, direct evidence of specific pecuniary loss would be impracticable, not to say impossible. *To hold that, without such direct evidence, no recovery beyond nominal damages could be had, would render nugatory the statute permitting a recovery for wrongful death . . . , as applied to the loss of a child of tender years.*' "

In the case of *Scholz v. Leuer,* 7 Wash. 2d 76, 109 P. 2d 294, the court considered this same question with reference to the wrongful death of plaintiff's fourteen year old daughter:

"Finally, appellants complain of the amount of the verdict, which was for five thousand dollars (funeral expenses, $606.63; damages, $4,-393.37).

"When a verdict has been challenged as excessive, the only inquiry which will be made in this court is whether or not it was the result of passion and prejudice. (Citing cases) There is no affirmative showing of passion and prejudice on the part of the jury, and it can not, under the circumstances, be inferred from the amount of the verdict."

On this same subject the court stated in *Sasse v. Hale Morton Taxi & Auto Co.*, 139 Wash. 359, 246 P. 940, as follows:

"A further contention made by the appellants is that the verdict is excessive. It is in the sum of $3,833.50, in addition to $575 costs and expenses of physicians, hospital and burial. Appellants rely on *Tecker v. Seattle, Renton & S. R. Co.*, 60 Wash. 570, 111 Pac. 791, Ann. Cas. 1912B 842, and *Blair v. Kilbourne*, 121 Wash. 93, 207 Pac. 953. In the first case, decided in 1910, a verdict for $2,500 was sustained for the wrongful death of a boy six years of age. The *Blair* case was decided in 1922. The verdict was for $5,000, and reduced by suggestion of this court to $2,500, for the death of a nine year old son, who was a 'healthy child of average intelligence'. In several recent cases, including *Allison v. Bartelt*, 121 Wash. 418, 209 Pac. 863, attention has been called to the reduced purchasing power of money over what it was a few years ago. There is not, nor can there be, any fixed standard by which damages in cases of this sort can be ascer-

tained and allowed, in the absence of legislative expression."

Also in *Vol. 14 A.L.R. 2d,* at page 550, there is an annotation on the subject of excessiveness and inadequacy of damages for personal injury resulting in death of an infant, where will be found collected numerous cases in which verdicts approximating, or in excess of the verdict in the case at bar for wrongful death were permitted to stand. So it can be seen that the Washington Court, recognizes that parents are entitled to recover substantial damages for the loss of a minor child, and that it is within the province of the jury to form an estimate of the pecuniary loss to the parent resulting from the death of the child, and that a variety of factors are involved in the proper formation of that estimate. There is in the case at bar no affirmative showing of passion or prejudice on the part of the jury and it surely cannot be inferred from the amount of the verdict. Appellee respectfully submits that Specification of Error No. XIV is without merit.

CONCLUSION

In conclusion, Appellee respectfully submits that the court should affirm the judgment of the District Court entered upon the verdict of the jury for the reason that (1) Appellant was shown to have been negligent in the maintenance of its crossing, (2) Appellant was shown to have been negligent in failing to give the required statutory warning whistles, (3) the question of contributory negligence on the part of the deceased was a question of fact for the jury and was resolved by that body adversely to Appellant, and (4) the doctrine of last clear chance as invoked in subdivisions (B) and (C) of Paragraph VII of the Complaint (Tr. 7). was properly submitted to the jury by the trial court, all in accordance with the facts and authorities heretofore reviewed.

Respectfully submitted,

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